Supreme Court, U.S.
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No. 98-961

In The

Supreme Court of the United States

October Term, 1998

WILLIAM L. MILLER,

Petitioner,

v.

J. D. ABRAMS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GEORGE & DONALDSON, L.L.P
DAVID H. DONALDSON, JR.
Counsel of Record
Texas Bar No. 05969700
1100 Norwood Tower
114 West 7th Street
Austin, Texas 78701
(512) 495-1400

DIETZ & ASSOCIATES, P.C.
R. MARK DIETZ
Texas Bar No. 05857200
J. LEE JARRAD, JR.
Texas Bar No. 10578200
106 Fannin Avenue East
Round Rock, Texas 78664
(512) 244-9314

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF CORPORATE AFFILIATES

Respondent J. D. Abrams, Inc.'s Parent Company is Abrams International, Inc.

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, J. D. Abrams, Inc. ("Abrams"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Court of Appeals for the Fifth Circuit's opinion in this case. That opinion is reported at 156 F.3d 598 (1998), and it is reprinted in Appendix A of Petitioner's Petition for a Writ of Certiorari.

For purposes of its opposition, Abrams adopts the Statement of the Case by Petitioner, William L. Miller ("Miller").

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Decision Below Does Not Raise a Conflict With the Eighth Circuit's Decision in *In re Long* That Requires This Court's Attention.

A. The alleged conflict is irrelevant in light of this Court's later decision, just last year, in *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S. Ct. 974, 140 L.Ed.2d 90 (1998).

An alleged conflict between the Fifth Circuit's decision below made after, and in light of, this Court's decision in *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S. Ct. 974, 140 L.Ed.2d 90 (1998) and *In re Long*, 774 F.2d 875, 881 (8th Cir. 1985), an Eighth Circuit decision from 14 years before this Court's decision in *Kawaauhau* is irrelevant and cannot be the basis for granting a petition for certiorari. This Court's decision in *Kawaauhau* is the latest word on the interpretation of the terms "willful and malicious injury" under § 523(a)(6). The Eighth Circuit decision in *In re Long*, from a decade earlier, does not reflect the Supreme Court's current thinking on the issue and any alleged conflict does not merit this Court's attention.

B. There is no true conflict between the decision below and the Eighth Circuit's decision in *In re Long*.

The Fifth Circuit, in its decision below, read the "willful and malicious injury" requirement of § 523(a)(6) as a collective concept, relying, in part, on this Court's analysis in *Kawaauhau*, 156 F.3d at 606. While the Eighth Circuit panel in *In re Long*, did

admonish that "willful" and "malicious" in 11 U.S.C. § 523(a)(6) "should not be lumped together to create an amorphous standard. . . . ," that admonishment was made in the specific context of pronouncing that a discharge should not be disallowed for a debtor's mere "reckless disregard of the creditors' economic interest." 774 F.2d at 881. Miller tries to create a conflict with a more expansive reading of that admonishment. In fact, the standard established by the Eighth Circuit in *In re Long* and by the Fifth Circuit in its decision below are remarkably similar.

"Treatment of the phrase ['willful and malicious'] as a collective concept" is not, as is asserted by Miller, synonymous with ignoring one element or the other therein. *Miller v. Abrams*, 156 F.3d 598, 606 (5th Cir. 1998), Petitioner's Appendix A at 16. Indeed, the Fifth Circuit panel below "consider[ed] them . . . in turn," first committing nine paragraphs solely to the meaning of "willful." *Id.* at 603-604, Petitioner's Appendix A at 8-12. When it reached the "malicious" prong, the Fifth Circuit spent another eight paragraphs deciding the right interpretation of the term "malicious." Once it had done so, it applied these interpretations to develop its understanding of the phrase "willful and malicious injury." The Fifth Circuit panel ultimately held that "an injury is 'willful and malicious' where there is either ***an objective substantial certainty of harm*** or a subjective motive to cause harm." *Miller v. Abrams*, 156 F.3d at 606, Petitioner's Appendix A at 16 (emphasis added).

Similarly, the Eighth Circuit panel in *In re Long* initially struggled with the meaning of "willful." *See Geiger v. Kawaauhau*, 113 F.3d 848, 852, *affirmed*, 523 U.S. 57, 118 S.Ct. 974 (1998) ("Not all of the cases that we have decided after the revision [of the bankruptcy code in 1978] have focused very precisely on the exact meaning of this new appreciation of what debts the bankruptcy code protects from discharge"). The Eighth Circuit panel in *Long* recognized the rule ultimately embraced by this Court, and followed by the Fifth Circuit below, that "there must be 'intent to cause injury' rather than merely an 'an intentional act which causes an injury' " *In re Long*, 774 F.2d at 880, *quoting, In re Cecchini*, 37 B.R. 671 (Bkrtcy. App. 9th Cir. 1984); *Kawaauhau*, 118 S.Ct. at 977.

Requiring a "heightened level of culpability . . . beyond recklessness and beyond [mere] intentional [acts]," the Eighth Circuit panel at the end stated that the test for "nondischargeability turns on whether the conduct is (1) headstrong and knowing ("willful") and, (2) targeted at the creditor ("malicious"), at least in the sense that the conduct is certain or almost certain to cause financial harm." *In re Long*, 774 F.2d at 881. Just like the Fifth Circuit below, the Eighth Circuit panel provided for an alternative means to measure its standard via the "***likelihood of harm in an objective sense***." *Id.* (Emphasis added). Indeed, the Eighth Circuit relied on Fifth Circuit case law to conclude that "[u]se of objective information to ascertain intent to cause harm is by no means unfamiliar." *Id.*, citing *Bogard v. Cock*, 586 F.2d 399, 412 (5th Cir. 1978), *cert. denied,* 444 U.S. 883, 100 S.Ct. 173 (1979).

Regardless of the characterization – "collective concept" by the Fifth Circuit or "should not be lumped together" by the Eighth Circuit – concerning the terms "willful and malicious," there simply is no significant difference between the tests enunciated by the Fifth Circuit below and by the Eighth Circuit in *In re Long*. Accordingly, there is no conflict as asserted by Miller that would justify this Court's granting of certiorari.

II. The Decision Below Does Not Raise a Conflict With the Eighth Circuit's Decision in *Geiger v. Kawaauhau* and Is At Least Consistent With This Court's Decision in *Kawaauhau v. Geiger*.

In justifying his Second Question Presented, Miller asserts that there is a conflict between the Fifth Circuit decision below and the Eighth Circuit's "decision" in *Geiger v. Kawaauhau*, 113 F.3d 848, *affirmed*, 523 U.S. 57, 118 S.Ct. 974, as to whether the "second prong" – "malicious" – in 11 U.S.C. § 523(a)(6) should be measured subjectively or objectively. In positing his Second Question Presented, Miller misreads *Geiger v. Kawaauhau*. More importantly, the standard announced by the Fifth Circuit in its opinion below is consistent with this Court's opinion affirming *Geiger v. Kawaauhau*.

A. In *Geiger v. Kawaauhau*, the Eighth Circuit did not decide the issue that is the basis for the alleged conflict.

In *Geiger v. Kawaauhau*, the Eighth Circuit analyzed only the term "willful" in the phrase "willful and malicious injury." 11 U.S.C. § 523(a)(6), it specifically did not address the meaning of the term "malicious." The Eighth Circuit stated the following:

> Since ***it is not necessary to a decision in this case that we decide the meaning of the word "malicious"*** and the bearing, if any, that the interpretation given to that word might have on the dischargeability of a judgment debt, ***we have no occasion to discuss the matter, and thus we venture no opinion on it***.

Geiger v. Kawaauhau, 113 F.3d at 854 (emphasis added). Since the Eighth Circuit expressed no opinion on the meaning of "malicious," there cannot be any conflict with the Fifth Circuit's decision on the meaning of "malicious."

B. The Fifth Circuit's decision is consistent with this Court's decision in *Kawaauhau v. Geiger*.

Regardless of Miller's assertion of this non-existent conflict between the decision of the Eighth Circuit in *Geiger v. Kawaauhau* and the decision of the Fifth Circuit below, this Court (if it does not grant Abrams' cross-petition for certiorari on this issue) should let stand the standard reaffirmed below allowing for non-dischargeability upon a showing of an objective substantial certainty of harm. 156 F.3d at 606, Petitioner's Appendix A at 16. As pointed out by the Eleventh Circuit, "[t]he majority of circuits that have addressed this issue have strictly interpreted section 523(a)(6) to require that the debtor either intend the resulting injury or ***intentionally take action that is substantially certain to cause the injury***." *In re Walker*, 48 F.3d 1161, 1164-65 (11th Cir. 1995) (holding "that section 523(a)(6) requires a deliberate or intentional injury," not just intending "merely the act that results in injury") (emphasis added).

The Fifth Circuit's decision below, allowing for the establishment of intent to injure by a showing of substantial certainty of

harm when the debtor takes the proscribed action, is at least consistent with this Court's decision in *Kawaauhau v. Geiger*, although in its cross-petition Abrams argues that the Fifth Circuit decision adds an unnecessary gloss on this Court's decision. In deciding *Kawaauhau*, the Court relied on the essence of that which is an "intentional tort"; in other words, "that the actor intend 'the *consequence* of an act,' not simply 'the act itself.' " 118 S.Ct. at 977, *quoting*, Restatement (Second) of Torts § 8A, comment a, p.15 (1964) (emphasis in original). Consistent with the Court's focus on "intentional tort" in *Kawaauhau v. Geiger*, the Fifth Circuit below relied on the original definition of intentional tort to conclude that "intending actual injury" is equated "to a situation in which 'the debtor intentionally took action that necessarily caused, or was substantially certain to cause, the injury.' " 156 F.3d at 604, Petitioner's Appendix A at 11, *quoting*, *In re Delaney*, 97 F.3d 800, 802 (5th Cir. 1996). Not only is there no conflict in the manner argued by Miller, the Fifth Circuit's decision below, as it noted, while adding unnecessary complication, is consistent with this Court's recent interpretation of § 523(a)(6).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

David H. Donaldson, Jr.
George & Donaldson, L.L.P
1100 Norwood Tower
114 West 7th Street
Austin, Texas 78701
(512) 495-1400

R. Mark Dietz
J. Lee Jarrad, Jr.
Dietz & Associates, P.C.
106 Fannin Avenue East
Round Rock, Texas 78664
(512) 244-9314